

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA

4 v.

11 Cr. 62 (PAC)

5 DONNA LEVY,
6 DAVID LEVY,

Jury Trial

Defendants.

7 -----x

8 New York, N.Y.
9 March 4, 2013
10 10:55 a.m.

11 Before:

12 HON. PAUL A. CROTTY

13 District Judge

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
17 Southern District of New York

CARRIE H. COHEN

HOWARD S. MASTER

18 Assistant United States Attorneys

19 HOWARD M. SREBNICK

NOAH FOX

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Attorneys for Defendant Donna Levy

21 GERALD L. SHARGEL

ROSS M. KRAMER

23 JENNIFER HAYS

Attorneys for Defendant David Levy

1 (Case called; jury panel not present)

2 THE COURT: Mr. Shargel.

3 MR. SHARGEL: Yes, your Honor. A housekeeping matter.

4 Mr. Levy is a diabetic.

5 THE COURT: Type 1 or type 2?

6 MR. SHARGEL: Type 2. He has been given bread by the
7 marshals, which is obviously not suitable. The point is that I
8 want the permission of the Court to give him a peanut butter
9 bar, unopened, commercial piece of candy or energy bar.

10 THE COURT: Fine.

11 MR. SHARGEL: Thank you.

12 THE COURT: The jury is on its way up?

13 THE CLERK: Yes, your Honor.

14 THE COURT: Tell us how many are there.

15 THE CLERK: We have 120 prospective jurors coming up
16 this morning.

17 THE COURT: We are going to have them fill out the
18 hardship questionnaire. That will take about a half an hour.
19 I will discharge them then until 1:00 or 1:30, depending on
20 when they finish, and then we'll start. I assume we needed an
21 array of about 80 to get the number of jurors. Have we talked
22 about peremptory challenges?

23 MR. MASTER: We have not, your Honor.

24 THE COURT: I propose that we have 12 for the
25 defendants and 6 for the government. You will be exercising 1

1 for the government and 2 for the defendants, do it in 6 rounds.

2 Do you want to be heard on the number of alternates?

3 MR. SHARGEL: I had a very brief conversation with one
4 of the prosecutors, and we talked about 4 alternates. I don't
5 know if that was because it was your Honor's wishes.

6 THE COURT: I had 4 in the last case. We used 3 of
7 the 4, and it was a 4-week trial.

8 MR. SHARGEL: Perhaps 6 might be better if you got so
9 close to the end of the alternates. Obviously, I leave it to
10 your discretion, your Honor.

11 THE COURT: I think 4 will probably be enough.

12 MR. MASTER: 4 is fine with the government.

13 THE COURT: Then you would have 2 peremptory
14 challenges, Mr. Shargel.

15 MR. SHARGEL: Yes, 1 for each 2.

16 THE COURT: And the government would have 1. So we'll
17 put 7 up there and you will exercise your challenges. The
18 remaining 4 will be the alternates.

19 MR. SHARGEL: Very well.

20 THE COURT: Who is sitting in the spectator seats?

21 MR. SHARGEL: This is Mr. Levy's father and a friend
22 of the family.

23 THE COURT: Space is going to be kind of tight. Why
24 don't they come in and sit in front of the bar. With 120
25 people, we are going to be packed.

1 MR. SHARGEL: I understand that. That will work.

2 MR. SREBNICK: Good morning, your Honor. Would it be
3 acceptable to the Court that throughout the trial an objection
4 by one defendant be treated as an objection by both unless the
5 other opts out?

6 THE COURT: Generally, I don't mind that. Does the
7 government want to be heard?

8 MR. MASTER: That's fine with the government.

9 THE COURT: Generally, I don't mind, so that's all
10 right.

11 MR. SREBNICK: While we are on housekeeping, I have
12 confirmed with Mr. Shargel, and he and I will jointly request
13 that the Court consider breaking roughly every hour and 15
14 minutes or so for washroom breaks. That would be our joint
15 request.

16 THE COURT: We break once in the morning and once in
17 the afternoon.

18 MR. SREBNICK: It is a question of becoming
19 uncomfortable after about that period of time.

20 THE COURT: Just so it is clear, I break for 15
21 minutes in the morning and 15 minutes in the afternoon. We are
22 starting at 10:00, we will go until 12:45, resume at 2:00 and
23 go to 5:00. We will have a break for 15 minutes somewhere
24 halfway in the morning and in the afternoon.

25 Mr. Shargel, with respect to your request which I have

1 already granted, and hopefully Mr. Levy has had nourishment, I
2 meant to ask the marshal if the marshal had any objection to
3 Mr. Levy having a snack.

4 THE MARSHAL: No.

5 THE COURT: Thank you. So we don't have to go through
6 this every time, if Mr. Levy is feeling low, you ought to keep
7 a bunch of snacks so he doesn't go low.

8 MR. SHARGEL: Very well.

9 DEFENDANT D. LEVY: Thank you.

10 (Recess)

11 THE COURT: The jury has arrived.

12 (Jury selection)

13 (In the robing room)

14 THE COURT: We'll start tomorrow at 10 o'clock and
15 we'll do the voir dire. You have seen the voir dire?

16 MS. COHEN: No, I don't believe we have, your Honor.

17 THE COURT: We'll send that around tonight. It
18 represents a blend of the government's requests and your
19 requests.

20 MR. SHARGEL: There was a defense request for attorney
21 voir dire.

22 THE COURT: It's not going to be granted. It's going
23 to be denied. I will follow the traditional practice.

24 The other questions I think we tried to incorporate
25 those questions that made sense. If you have others that we

1 have left out that you feel strongly about, let us know.

2 MR. SHARGEL: Very well.

3 THE COURT: Let us know by 9 o'clock tomorrow. That
4 will give us enough time to work it into the questionnaire.

5 MR. SHARGEL: Judge, can I raise one thing? There is
6 one issue that may place a burden on the Court. Several days
7 ago we asked that the Court order that the redacted portions of
8 the 3500 material be provided to your Honor.

9 THE COURT: You gave me one example, 3511-14.

10 MR. SHARGEL: There are many.

11 THE COURT: I only have one.

12 MR. KRAMER: In our letter we put that in as an
13 example.

14 THE COURT: I know. I thought Mr. Shargel was saying
15 they submitted a lot more. I only got the one that you
16 submitted.

17 MR. SHARGEL: Here is why. We suggested to the
18 government that all that had been redacted be provided to the
19 Court, have ready for the Court, rather than simply identifying
20 it. We both know what has been redacted because it is clearly
21 redacted. I could supply you with a copy where there is a
22 Post-it by every redaction.

23 MS. COHEN: I believe you are talking about two
24 different 3500 documents that are multipage.

25 MR. SHARGEL: There is more than that. I'm not

1 objecting to redactions that have to do with identifying
2 characteristics, Social Security numbers, telephones. I'm not
3 suggesting you look at that. But there are in many of the
4 reports blocks, paragraphs, whole paragraphs taken out.

5 THE COURT: You submitted one to me, right?

6 MR. KRAMER: I did in our letter.

7 THE COURT: 3511-14. I took it as an example, a 5- or
8 6-page document.

9 MR. KRAMER: Yes.

10 THE COURT: The total printing on it that you could
11 see was 2 pages. There were 4 pages or more of blanks.

12 MR. SHARGEL: Correct.

13 THE COURT: You asked me under 3500 to take a look.

14 MR. SHARGEL: Yes.

15 THE COURT: And asked the government to produce an
16 unredacted version so I could check the redactions.

17 MR. SHARGEL: Yes, sir.

18 MS. COHEN: We can talk and you can tell me exactly
19 which documents. I just want to make sure.

20 MR. SHARGEL: I will do that as soon as we go back to
21 the office.

22 THE COURT: I think I have the document.

23 MS. COHEN: Yes. I believe he is saying other
24 documents. I had thought it was limited to that document and
25 one like it.

1 MR. SHARGEL: No. I was asking that all redactions be
2 reviewed. It's just that a paragraph was missing in the
3 middle.

4 THE LAW CLERK: The parties submitted a large set
5 of --

6 THE COURT: That's 3501. I meant the trial notebook
7 that she gave me. I think I have in my notebook the document
8 that you submitted.

9 MR. SHARGEL: Yes. Again, that was simply an example.

10 THE COURT: No, I left it upstairs. At any rate,
11 we'll talk. You want me to check the redactions to make sure
12 that there is a basis for them?

13 MR. SHARGEL: Yes.

14 THE COURT: OK.

15 MR. SHARGEL: If the government wants to take the
16 burden, or we can do it, it doesn't matter.

17 MS. COHEN: If you could tell us which documents you
18 are requesting.

19 THE COURT: I thought it was very much like the
20 question of somebody down in Georgia didn't want to turn over
21 the affidavits, so you couldn't use the tapes. I understood
22 the request to say if the Eastern District of New York wanted
23 to redact all these things, then the witness couldn't testify.

24 MR. KRAMER: Yes.

25 MS. COHEN: That's different from the other

1 redactions. You're just talking about that one witness?

2 MR. SHARGEL: No.

3 MS. COHEN: You're not.

4 MR. SHARGEL: Here is how we can separate it out. If
5 we are talking about one issue with another district, there is
6 the Eastern District document that was turned over in another
7 case pursuant to section 3500 with regard to a witness named
8 Phil.

9 MS. COHEN: Orlando.

10 MR. SHARGEL: Mr. Orlando cooperated enthusiastically
11 in the Eastern District. Apparently, his attorney prepared 85
12 different -- I'm guessing now, I don't have it in front of
13 me -- a large number of different schemes that Mr. Orlando had
14 knowledge of. I think that this goes to motive, bias,
15 hostility, and it's fair game for cross-examination. Parts of
16 it have been revealed, but only those parts where Mr. or Mrs.
17 Levy are mentioned.

18 We want an unredacted part to show the level.
19 Obviously, if this person knows so much about fraudulent stock
20 matters, he could be cross-examined about his involvement and
21 his efforts to curry favor with the government. I don't think
22 anyone is quarreling with the proposition that he could be
23 cross-examined about that.

24 That's a stand-alone, I think, because that is the
25 only issue about another district. But within this district

1 and work that is done by these prosecutors or predecessor
2 prosecutors, there are redactions of paragraphs. Again, I'm
3 not interested in identifying a permission, but substantive
4 redactions.

5 What I'll do this evening is, with the help of Ms.
6 Hays, take the 3500 materials, it's not all that voluminous,
7 and we'll put a yellow Post-it on the redaction and give you
8 either a list or a set of the 3500 material with the Post-its.

9 I think this is a mandatory process under 3500(b), if
10 I'm not mistaken. There is a (c)? (c), one letter off. Under
11 3500(c). I assure the Court this is not some empty exercise to
12 make work. I'm not doing that. I think there may be fertile
13 ground for cross-examination there.

14 MS. COHEN: We will look at whatever other documents
15 you claim were redacted, not just phone numbers and Social
16 Security numbers, etc. I'm aware of the issue with the Eastern
17 District document. It is redacted to protect potentially
18 ongoing investigations where that defendant is a cooperator of
19 the Eastern District of New York. He supplied information over
20 a long period of time.

21 I do not know the status of all the different people
22 that he identified as engaging in criminal activities. They
23 obviously have nothing to do with this case. If the government
24 decides to call him, and we haven't made a final decision on
25 that, but if he gets on the stand, he will talk about all of

1 his criminal conduct and all the people he knows. I don't know
2 that it is necessary to identify each person, and I'd be
3 worried about jeopardizing the investigations that I don't even
4 know about.

5 THE COURT: If you put him on the stand, are you going
6 to produce all the 3500 material.

7 MS. COHEN: We will produce it and redact it.

8 THE COURT: Are you going to unredact it if he takes
9 the stand?

10 MS. COHEN: No, because I don't know if these people
11 are being investigated by this district or other district.

12 MR. SHARGEL: If I may, Judge, that is a very, very
13 thin suggestion that there are continuing investigations. This
14 document was turned over to defense counsel in the Eastern
15 District cases in what year?

16 MS. COHEN: It was turned over only about a year ago.
17 The document itself was created in 2008, but it was turned over
18 redacted and --

19 MR. SHARGEL: My point is it was turned over in 2008
20 even redacted. I can't imagine that five years later there is
21 still a sensitive investigation on it.

22 MR. KRAMER: I don't think this is actually a ground
23 under 3500(d) anyway. I think that is still fair game.

24 THE COURT: I guess what the mode is now, you're going
25 to identify the documents.

1 MR. SHARGEL: Yes.

2 THE COURT: And you're going to justify it.

3 MS. COHEN: We will produce them and your Honor will
4 decide. Also, with regard to that one document we informed
5 defense counsel of, the document related to Phil Orlando, that
6 very clearly says "attorney-client privilege" on top. As I
7 understand it from Phil Orlando, he prepared that document at
8 the direction of his counsel to tell his then defense counsel
9 prior to cooperating with the Eastern District of all the
10 things he could potentially tell the Eastern District about.

11 Inadvertently, he gave that document along with other
12 documents to the FBI agent who was handling him, so that there
13 was an inadvertent disclosure. The Eastern District prosecutor
14 did not know that fact and turned it over in 3500. But since
15 we are now aware of that, I would also argue that that document
16 is an attorney-client privilege and that it was inadvertently
17 disclosed by Phil Orlando.

18 MR. SHARGEL: Then I would ask for a hearing on that
19 issue because I don't believe that to be the case. I think
20 they were trying to make a deal for Phil Orlando. There were
21 other documents turned over as well. He had very experienced
22 counsel. Actually, I believe Leslie Crocker Snyder was his
23 counsel. She was doing all that she could to win a favorable
24 resolution for her client. I don't believe that it was turned
25 over accidentally, because it would do nothing but help Mr.

1 Orlando to have that turned over to the government.

2 Obviously, I don't understand why they are claiming
3 privilege. Obviously, he was debriefed on these very issues.
4 Obviously, he discussed these issues with the prosecutors and
5 the FBI agents. I don't know whether he ever got to testify.
6 I think he didn't.

7 MS. COHEN: He didn't.

8 THE COURT: We will consider these issues when they
9 come up. I guess they are going to come up shortly?

10 MR. SHARGEL: Yes.

11 THE COURT: I appreciate the advance argument.

12 MS. COHEN: It's a preview.

13 MR. MASTER: Preargument.

14 MR. SHARGEL: I'd like to alert you to one more thing.
15 I know you have a pile of things on your desk.

16 THE COURT: I'm on high alert now. Go ahead.

17 MR. SHARGEL: Here on high alert is that I think the
18 government's intended first witness -- remind me of his name.

19 MS. COHEN: Peter Melley.

20 MR. SHARGEL: Peter Melley from FINRA. I think we
21 have an argument. I don't know if your Honor has had a chance
22 to look at it.

23 THE COURT: I haven't looked at your papers.

24 MR. SHARGEL: I think clearly under Second Circuit law
25 this is, as the courts say, an expert witness in lay witness's

1 clothing. If he's going to get on the stand and he has
2 specialized knowledge, then he has to testify within the
3 confines of 702. More importantly, despite several requests on
4 our part, we asked again and again and again do you have an
5 expert witness, and the government said no. And we have no
6 expert witness report.

7 As I sit here now probably a day and a half or two
8 days from when he is going to testify and I am going to cross-
9 examine him, I have no really idea of what he is going to
10 define. The government says he is going to define terms. The
11 Second Circuit has made crystal clear, and it is in the brief,
12 that if he is going to define terms or impart specialized
13 knowledge, he is an expert witness.

14 THE COURT: What is he going to say?

15 MR. MASTER: Your Honor, we submitted responsive
16 briefing. I think it is absolutely clear that Mr. Melley, who
17 has testified on numerous occasions as a nonexpert witness in
18 this district, and others at FINRA who work with him preparing
19 summary charts describing stock trades, proceeds of stock
20 sales, integrating numerous sources of financial data and data
21 gathered by FINRA into summary charts are summary witnesses,
22 they are not expert witnesses.

23 I believe your Honor had a FINRA witness testify in
24 the Tomasetta trial that was before this Court on several
25 occasions. Mr. Melley reports that he has never had to be

1 qualified as an expert to do what he does and has done for more
2 than ten years.

3 THE COURT: The objection is not to the summary
4 charts, is it?

5 MR. SHARGEL: No. Well, actually, there may be an
6 objection to the summary charts. Rule 1006 clearly says where
7 you have a huge, voluminous documents. I don't see that the
8 underlying documents to the chart that were put in evidence
9 were voluminous.

10 MR. KRAMER: These charts aren't just summary charts
11 in this case. What they are are charts that do exactly what
12 the expert would do, draw the inference that there was a causal
13 connection between certain Internet promotions and spikes in
14 volume and price of stocks.

15 What he does on the charts is he does a stock price
16 and then puts a sticker on days when there is Internet
17 promotions, giving the inference to the jury, like an expert
18 would, that there is a correlation between the two things.
19 That's exactly what an expert would testify to.

20 MR. SHARGEL: In other words, he's gathering the
21 information under 702.

22 THE COURT: He could put on a summary chart that on a
23 certain day the stock of the company was X and the trading
24 volume was Y. He could put it on the chart that says these are
25 the press releases that were issued.

1 MR. KRAMER: He titles these "Analysis," and actually
2 there is a correlation between what would be two separate
3 charts. By overlaying them on top of one another, this is an
4 expert opinion that there is a one-to-one correlation. There
5 was a tout on this day and there was a stock price here. So
6 it's really an ultimate issue in the case, whether the tout
7 created a upward tick in the stock price and volume.

8 THE COURT: Is he going to testify what a tout is?

9 MR. KRAMER: I think so.

10 THE COURT: Does he have to be an expert to do that?

11 MR. SHARGEL: He is defining it. Yes, because he is
12 defining it based on specialized knowledge. That's the point.
13 He's going to either talk about reverse mergers. You can
14 correct me if I'm wrong, but reverse mergers, stock splits,
15 penny stock, pink sheets, he's going to give these definitions.

16 I've been in stock fraud cases in this district where
17 witnesses doing this very same thing are qualified as experts.
18 There is no big deal, except I don't know if this is skirting
19 the provisions of Rule 16 that require something more than the
20 résumé that we got with this individual. They require a
21 statement as to what he is going to testify to.

22 THE COURT: You filed this motion in limine when?

23 MR. KRAMER: I believe it was last Friday, when we
24 first got the 3500 for him. It was just his CV and a set of
25 charts.

1 MS. COHEN: We filed an opposition.

2 THE COURT: You filed the opposition yesterday?

3 MS. COHEN: Correct.

4 MR. SHARGEL: We ask you to take a look at the brief.

5 THE COURT: I will.

6 MR. SHARGEL: Thank you.

7 MS. COHEN: You have another motion in limine pending
8 that may go to openings?

9 MR. SHARGEL: Yes. You may remember this case, a 1980
10 case of United States v. Stanley Stahl, the real estate tycoon.

11 THE COURT: Yes.

12 MR. SHARGEL: The Second Circuit reversed the
13 conviction.

14 THE COURT: Who is the guy that wanted to kill Stanley
15 Stahl? He ran for governor.

16 MR. SHARGEL: Hirschfeld.

17 THE COURT: Yes, I remember Stanley Stahl. What does
18 the Second Circuit say?

19 MR. SHARGEL: The Second Circuit said, reversing the
20 conviction, that the prosecutor leaned too heavily on class
21 distinction. One of the things they said was in summation the
22 prosecutor said he sits in his fancy offices on Park Avenue.
23 The government has argued in its response, well, the
24 acquisitions that the Levies made demonstrate their greed. But
25 in Stanley Stahl's case, as in every financial case, to every

1 alleged offense for financial gain there is a question of
2 greed.

3 What the Stahl court did was say you can't splash it
4 in front of the jury. They are going to introduce on their
5 exhibit list pictures of cars and boats and acquisitions. They
6 are doing precisely I think what was done in the Stahl case.

7 In the Stahl case you might remember the facts are
8 that Stanley Stahl was convicted of bribing an IRS agent to
9 save a huge amount of money because his deceased father's
10 estate was being audited by the IRS. The claim was that Mr.
11 Stahl bribed the agent. Obviously, Mr. Stahl wanted to save
12 huge amounts of money, huge amounts under 1979 or 1980 money.
13 That doesn't mean that they could get up and rail against his
14 wealth and how wealthy he is. That's what they were doing,
15 precisely that.

16 What the prosecutors were doing with Stanley Stahl, I
17 respectfully ask you to take a look at the case, is precisely
18 what they want to do here.

19 MR. MASTER: Your Honor, they filed this motion
20 yesterday. They have known that this has been an issue for
21 quite some time. We responded the same day. I think it is a
22 whole meritless argument. This is direct evidence of the
23 fraud, evidence of how they spent their money. We addressed
24 this in the brief that we filed last night shortly after
25 receiving the motion in limine.

1 First of all, the defendants said to numerous
2 corporate victims, numerous small businessmen, that they were
3 cutting them off, they were stopping funding for these
4 companies. They said times were tight, we just don't have the
5 money to continue to follow up. That was a lie, and we can
6 show that because they spent money on themselves instead of
7 sending it back to the companies.

8 Second, they told these companies, I'm sorry, these
9 small businessmen would come, try to figure out if these were
10 legitimate people.

11 THE COURT: All this is in your papers, right?

12 MR. MASTER: Yes.

13 THE COURT: I will reread the papers. The due date is
14 when?

15 MS. COHEN: Openings, your Honor, tomorrow.

16 MR. MASTER: We need to know tomorrow.

17 THE COURT: Thanks for giving me all this advance
18 notice.

19 MR. SHARGEL: That's what I want to address. We filed
20 on the very day that we got the government's exhibit list. We
21 saw that on the exhibit list you had not only what Mr. Master
22 just said but that they are going to have pictures up on the
23 screen.

24 MR. KRAMER: Multiple pictures of the Bentley.

25 MS. COHEN: The defendant's lavish lifestyle was in

1 the indictment.

2 MR. MASTER: There is no surprise. If they want two
3 photos of the Bentley instead of three, we'll compromise.

4 MS. COHEN: We briefed it as soon as we got it.

5 THE COURT: I'll read it to be better informed and get
6 to it promptly.

7 I think it will take us most of the day to get through
8 the jury selection, so I think we are on schedule for opening
9 statements on Wednesday, the 6th.

10 MR. SHARGEL: Yes.

11 THE COURT: Mr. Srebnick?

12 MR. SREBNICK: May I elect to defer my opening until
13 the defense case if I so choose? Is that an option?

14 THE COURT: Not with me. It's not an option. You
15 open when we do the openings. What you propose is not an
16 option. If you want to do an opening, do an opening. If you
17 don't want to do an opening, that's fine, too. If you want to
18 do an opening, you have to do it after the government.

19 I suppose you will be opening.

20 MR. SHARGEL: Yes.

21 THE COURT: And after Mr. Shargel. Anything else?

22 MR. SHARGEL: No, sir.

23 MR. MASTER: No, your Honor.

24 THE COURT: See you tomorrow at 10 o'clock.

25 (Adjourned to 10:00 a.m., March 5, 2013)